

State of Arizona
Senate
Forty-eighth Legislature
Second Regular Session
2008

SENATE BILL 1038

AN ACT

AMENDING SECTIONS 13-3705 AND 44-1453, ARIZONA REVISED STATUTES; RELATING TO THE REGISTRATION AND PROTECTION OF TRADEMARKS AND SERVICE MARKS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 13-3705, Arizona Revised Statutes, is amended to
3 read:

4 13-3705. Unlawful copying or sale of sounds or images from
5 recording devices; true name and address of
6 articles; definitions; classification

7 A. A person commits unlawful copying or sale of sounds or images from
8 recording devices by knowingly:

9 1. Manufacturing an article without the consent of the owner.

10 2. Distributing an article with the knowledge that the sounds thereon
11 have been so transferred without the consent of the owner.

12 3. Distributing or manufacturing an article on which sounds or images
13 have been transferred which does not bear the true name and address of the
14 manufacturer in a prominent place on the outside cover, box, ~~or~~ jacket **OR**
15 **LABEL**.

16 4. Distributing or manufacturing the outside packaging intended for
17 use with articles which does not bear the true name and address of the
18 manufacturer in a prominent place on the outside cover, box, ~~or~~ jacket **OR**
19 **LABEL**.

20 5. Transferring or causing to be transferred to an article any
21 performance, whether live before an audience or transmitted by wire or
22 through the air by radio or television without the consent of the owner and
23 with the intent to obtain commercial advantage or personal financial gain.

24 6. Distributing an article with knowledge that the performance on the
25 article, whether live before an audience or transmitted by wire or through
26 the air by radio or television, has been transferred without the consent of
27 the owner.

28 B. This section shall not apply to any person or persons engaged in
29 radio or television broadcasting who transfers, or causes to be transferred,
30 any such sounds, other than from the sound track of a motion picture,
31 intended for, or in connection with, broadcast transmission or related uses,
32 including the making of commercials and films, or for archival purposes.

33 C. Subsection A, paragraphs 1 and 2 of this section apply only to
34 recordings first fixed in a phonorecord before February 15, 1972.

35 D. Notwithstanding any other law and in the absence of a written
36 agreement, the performer of a live performance is presumed to own the rights
37 to record the performance.

38 E. The person who maintains custody and control over the business
39 records of the owner is the proper witness regarding the issue of consent.

40 F. On conviction of a violation of this section, the court shall
41 order:

42 1. The forfeiture and destruction of the articles and outside
43 packaging.

1 2. The forfeiture pursuant to chapter 39 of this title of any
2 implement, device or equipment used to manufacture or distribute the article
3 or outside packaging.

4 3. THE DEFENDANT TO MAKE RESTITUTION TO ANY OWNER OR LAWFUL PRODUCER
5 OF A MASTER RECORDING, MASTER DISC, MASTER TAPE, MASTER VIDEOTAPE, MASTER
6 FILM OR OTHER DEVICE OR ARTICLE FROM WHICH SOUNDS OR VISUAL IMAGES ARE
7 DERIVED THAT HAS SUFFERED INJURY RESULTING FROM THE VIOLATION, OR TO THE
8 TRADE ASSOCIATION REPRESENTING THE OWNER OR LAWFUL PRODUCER. THE ORDER OF
9 RESTITUTION SHALL BE BASED ON THE AGGREGATE WHOLESALE VALUE OF LAWFULLY
10 MANUFACTURED AND AUTHORIZED RECORDED DEVICES CORRESPONDING TO THE
11 NONCONFORMING RECORDED DEVICES INVOLVED IN THE VIOLATION AND SHALL INCLUDE
12 INVESTIGATIVE COSTS RELATING TO THE VIOLATION.

13 G. In this section, unless the context otherwise requires:

14 1. "Article" means the tangible medium on which sounds or images are
15 recorded including any original phonograph record, disc, compact disc, tape,
16 audio or video cassette, wire, film or other medium now known or later
17 developed on which sounds or images are or can be recorded or otherwise
18 stored, or any copy or reproduction which duplicates in whole or in part the
19 original.

20 2. "Distributing" means the actual, constructive or attempted sale,
21 rental, delivery, possession, transportation, exhibition or advertisement of
22 an article with intent to obtain commercial advantage or personal financial
23 gain or to promote the sale of any goods.

24 3. "Fixation of sounds" means the master recording from which copies
25 can be made of the series of sounds constituting the sound recording.

26 4. "Manufacturing" means transferring or causing to be transferred any
27 sounds or images recorded on one article to another article with the intent
28 to distribute the article.

29 5. "Owner" means the person who owns the original fixation of sounds
30 or images embodied in the master phonograph record, master disc, master
31 compact disc, master tape, master film or other device used for reproducing
32 recorded sounds on phonograph records, discs, compact discs, tapes, films or
33 other articles on which sound is or can be recorded, and from which the
34 transferred recorded sounds are directly or indirectly derived, or the person
35 who owns the rights to record or authorize the vending of a live performance.

36 6. "Phonorecord" means the material object in which sounds other than
37 those accompanying a motion picture or other audiovisual work are fixed by
38 any method now known or later developed, and from which can be perceived,
39 reproduced or otherwise communicated directly or with the aid of a machine or
40 device. Phonorecord includes the material object in which the sound is first
41 fixed.

42 H. Unlawful copying or sale of sounds or images involving one ~~thousand~~
43 HUNDRED or more articles containing sound recordings or one hundred or more
44 articles containing audiovisual recordings is a class 3 felony. Unlawful
45 copying or sale of sounds or images involving ~~one hundred~~ TEN or more but

1 less than one ~~thousand~~ HUNDRED articles containing sound recordings or ten or
2 more but less than one hundred articles containing audiovisual recordings is
3 a class 6 felony. Unlawful copying or sale of sounds or images involving
4 less than ~~one hundred~~ TEN articles containing sound recordings or less than
5 ten articles containing audiovisual recordings is a class 1 misdemeanor.

6 Sec. 2. Section 44-1453, Arizona Revised Statutes, is amended to read:

7 44-1453. Counterfeit marks; violation; classification;
8 presumption; seizure; forfeiture; remedies;
9 definitions

10 A. Except as provided in subsections B, ~~and~~ C AND D OF THIS SECTION, a
11 person who knowingly and with intent to sell or distribute uses, displays,
12 advertises, distributes, offers for sale, sells or possesses any item that
13 bears a counterfeit mark or any service that is identified by a counterfeit
14 mark is guilty of a class 1 misdemeanor.

15 B. A person who commits any act proscribed in subsection A OF THIS
16 SECTION is guilty of a class 6 felony if either:

17 1. The person has one previous conviction under this section.

18 2. At least one of the following is true:

19 (a) The violation involves more than one hundred but fewer than one
20 thousand items that bear the counterfeit mark.

21 (b) The total retail value of all of the items or services that bear
22 or are identified by the counterfeit mark is more than one thousand dollars
23 but less than ten thousand dollars.

24 C. A person who knowingly manufactures or produces with intent to sell
25 or distribute any item that bears a counterfeit mark or any service that is
26 identified by a counterfeit mark is guilty of a class 5 felony.

27 D. A person who commits any act proscribed by subsection A OF THIS
28 SECTION is guilty of a class 5 felony if either:

29 1. The person has two or more previous convictions under this section.

30 2. At least one of the following is true:

31 (a) The violation involves at least one thousand items that bear the
32 counterfeit mark.

33 (b) The total retail value of all of the items or services that bear
34 or are identified by the counterfeit mark is at least ten thousand dollars.

35 E. A person who knowingly has possession, custody or control of at
36 least twenty-six items that bear a counterfeit mark is presumed to possess
37 the items with intent to sell or distribute the items.

38 F. In any criminal proceeding in which a person is convicted of a
39 violation of this section, the court may order the convicted person to pay
40 restitution to the intellectual property owner.

41 G. A law enforcement officer may seize any item that bears a
42 counterfeit mark and all other personal property that is employed or used in
43 connection with a violation of this section, including any items, objects,
44 tools, machines, equipment, instrumentalities or vehicles. All personal

1 property seized pursuant to this section shall be forfeited pursuant to title
2 13, chapter 39.

3 H. After a disposition or final judgment, on the request of the
4 intellectual property owner, a law enforcement officer shall release all
5 seized items that bear a counterfeit mark to the intellectual property owner
6 for destruction or disposition. If the intellectual property owner does not
7 request the release of the seized items that bear a counterfeit mark, the law
8 enforcement officer shall destroy the items unless the intellectual property
9 owner consents to another form of disposition.

10 I. Any certificate of registration pursuant to this article or federal
11 law of any intellectual property is prima facie evidence of the facts stated
12 in the certificate of registration.

13 J. In addition to the remedies provided in section 44-1451, an
14 intellectual property owner who sustains a loss as a result of a violation of
15 this section may file an action in superior court for recovery of up to
16 treble damages and the costs of the suit including reasonable attorney fees.

17 K. The remedies provided in this section are cumulative to all other
18 civil and criminal remedies provided by law.

19 L. For the purposes of this section, the quantity or retail value of
20 items or services includes the aggregate quantity or retail value of all
21 items that the defendant manufactures, uses, displays, advertises,
22 distributes, offers for sale, sells or possesses and that bear a counterfeit
23 mark or that are identified by a counterfeit mark.

24 M. For the purposes of this section:

25 1. "Counterfeit mark" means:

26 (a) Any unauthorized reproduction or copy of intellectual property.
27 (b) Intellectual property that is affixed to any item that is
28 knowingly sold, offered for sale, manufactured or distributed or to any
29 identifying services offered or rendered without the authority of the
30 intellectual property owner.

31 2. "Intellectual property" means any trademark, service mark, trade
32 name, label, term, device, design or word that is adopted or used by a person
33 to identify that person's goods or services.

34 3. "ITEM" INCLUDES:

35 (a) ANY COMPONENT THAT IS DESIGNED, MARKETED OR OTHERWISE INTENDED TO
36 BE USED ON OR IN CONNECTION WITH ANY GOODS OR SERVICES.

37 (b) ANY COMPONENT OF A FINISHED PRODUCT.

38 3. 4. "Retail value" means:

39 (a) For items that bear a counterfeit mark and that are components of
40 a finished product, the counterfeiter's regular selling price of the finished
41 product on or in which the component would be utilized.

42 (b) For all other items that bear a counterfeit mark or services that
43 are identified by a counterfeit mark, the counterfeiter's regular selling
44 price for those items or services.